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No. 92-569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NATIONAL KIDNEY PATIENTS ASSOCIATION, *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN, M.D., SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND WILLIAM L. ROPER, M.D., ADMINISTRATOR OF THE UNITED STATES HEALTH CARE FINANCING ADMINISTRATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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Respondents' brief in opposition is significant for what it fails to address. Petitioners here rely on this Court's holding in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986), that claims involving "methods" of reimbursement under Medicare are not covered by the statutory provision governing administrative and judicial review of "amounts" determinations, 42 U.S.C. § 1395ff(b)(1)(C), and thus may be brought directly to court. We also contend that this "amount/method" distinction was expressly incorporated into the statute after *Michigan Academy*. Respondents simply ignore these critical points.

Thus, without addressing this Court's actual reasoning in *Michigan Academy*, the Government argues that the Court in that case manufactured a non-statutory basis for judicial review solely in order to avoid the conclusion that basic Part B reimbursement methodologies are entirely unreviewable. They then contend that this decision was overruled *sub silentio* when Congress amended section 1395ff(b)(1)(C) to provide an alternative avenue to review—*i.e.*, by including Part B "amount" determinations among the actions that may be challenged under that section. This reasoning, like the Government's additional contention that there is no conflict in the circuits, does not withstand scrutiny.

1. When all is said and done, the fact remains that respondents and the court below have faulted petitioners for failing to follow a statutory exhaustion rule that does not apply to their claim. Thus, although respondents seek to recast *Michigan Academy*, the Court there flatly held that *no* provision in the statute, including section 1395ff(b)(1)(C) with its exhaustion rule for challenges to the "amount" of reimbursement, "speak[s] to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." *Michigan Academy*, 476 U.S. at 675 (emphasis in original). This ruling was the linchpin of the Court's further conclusion that, while Congress had impliedly precluded judicial review of Part B "amount" claims by omitting them from section 1395ff(b)(1)(C) (*see United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982)), it had not similarly precluded review of Part B "method" claims. 476 U.S. at 676.

The D.C. Circuit, in turn, acknowledged that petitioners' claim falls into the "method" category. Pet. App. 12a. It nevertheless held that they were required to comply with the very administrative exhaustion requirement that this Court has held to be inapplicable to this type of claim. It did so solely on the ground that section

1395ff(b)(1)(C) was broadened in 1986 to cover "amount" claims under Part B as well as Part A. *Ibid.*

Respondents now seek to uphold this anomalous reasoning by arguing that, after this amendment, there is no longer any need to recognize some other avenue for judicial review of any Part B claim. They ask the Court to conclude that all "method" claims, under Part A and Part B, are now covered by section 1395ff(b)(1)(C) and by the administrative exhaustion requirement previously recognized in *Heckler v. Ringer*, 466 U.S. 602 (1984). In so doing, however, they ignore entirely the Court's actual construction of the statutory scheme in *Michigan Academy*. Thus, although the potential absence of judicial review was certainly a background consideration in the Court's analysis in that case, the Court in fact concluded that the pre-1986 version of section 1395ff(b)(1)(C) did not apply to any "method" claims, including the Part A "method" claims that were never, under any theory, totally insulated from judicial review.[1]

Now that the same section has been amended to cover Part B "amount" claims, it makes no sense to say that this change magically transformed the provision into one covering "method" claims as well. To the contrary, the only fair reading of *Michigan Academy* is that the section never covered "method" claims even under Part A, and that its amendment to cover Part B went no further than

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[1] As *United States v. Erika, Inc.*, 456 U.S. 201 (1982), illustrates, the Court has not hesitated to bar judicial review of some types of administrative action where congressional intent was clear. The presumption favoring review comes into play in the absence of clear congressional intent to foreclose such review. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888, 896-99 (1991). Contrary to respondents' contentions (Br. in Opp. 10-11), nothing in *McNary* or any other decision of this Court stands for the converse proposition that direct judicial review should be denied where the claimants could instead have proceeded first through an administrative process that Congress did not intend to extend to their type of claim.

to equalize treatment of "amount" claims under both parts. This means that "method" claims under both parts are still entirely unaddressed by the review provisions in the statute, and therefore may be pursued directly in court under 28 U.S.C. § 1331.

Respondents' repeated reliance on *Ringer* simply misses the point. That case never even considered the "amount/method" distinction. Nor, of course, did it hold that claimants are required to exhaust administrative processes that do not apply to their particular claims. Two years later, in *Michigan Academy*, when the Court *did* consider and adopt the "amount/method" distinction, it then distinguished *Ringer* as an "amount" case and thus one where exhaustion was appropriately required. 476 U.S. at 677 n.7. In any event, to the extent that there is some tension between *Ringer* and the subsequent decision in *Michigan Academy*, that tension itself argues strongly for a grant of review in this case.

Certainly respondents point to nothing to suggest that Congress, in expanding the coverage of section 1395ff(b)(1)(C) to include Part B "amount" claims, intended to overrule the holding of *Michigan Academy* with respect to "method" claims. If Congress had wanted to do that, it could easily have amended the section to cover claims challenging payment methodologies. But it did not do so. On the contrary, the sequence of events in the legislative history makes clear that the proposal to include Part B "amount" claims under the section was drafted long before the decision in *Michigan Academy*, solely in order to overrule the Court's earlier determination in *Erika* that Part B "amount" claims could be pursued only with private carriers. *See* Pet. 16-17.

Indeed, far from repudiating the "amount/method" distinction, Congress expressly adopted it in the very same 1986 amendments. As described in the petition, Congress also amended section 1395ff(b)(4) to bar challenges to pre-1981 regulations or instructions relating to

the "*method* for determining the amount of payment under part B." *See* Pet. 17-18. This change expressly incorporated the new "method/amount" distinction first enunciated in *Michigan Academy*, while grandfathering some longstanding rules. The amendments, in turn, were described by a key sponsor as *strengthening* the rights recently recognized in *Michigan Academy*. Yet respondents do not even mention section 1395ff(b)(4) or this aspect of the legislative history. That omission further demonstrates that respondents lack a persuasive basis for arguing that the 1986 legislative changes somehow undercut this Court's ruling in *Michigan Academy*.

2. Respondents are equally unsuccessful in their effort to dismiss the clear conflict over these issues among the circuits. They acknowledge that in *McCuin v. Secretary of HHS*, 817 F.2d 161 (1st Cir. 1987), the court squarely held that *Michigan Academy* authorized immediate judicial review of a Part A payment methodology, without regard to the requirements of section 1395ff(b)(1)(C). Br. in Opp. 14. Since the 1986 amendments made the statutory treatment of Part B claims identical with the treatment of Part A claims, this decision is irreconcilable with the decision below and with the recent ruling of the Second Circuit in *Abbey v. Sullivan*, No. 92-6055, 1992 U.S. App. LEXIS (2d Cir. Sept. 28, 1992) (also dealing with a Part B claim).

While disagreeing with *McCuin*, respondents suggest that it is distinguishable because the plaintiff there would otherwise have been denied all review, having failed to satisfy the amount-in-controversy requirement under section 1395ff(b)(1)(C), (2). Br. in Opp. 14. Yet nothing in the First Circuit's analysis indicates that it was relying on this factor. The court simply held that, after *Michigan Academy*, "method" claims under Part A (like those under Part B) may be brought directly to court.

Respondents also acknowledge that *dicta* in *Bodimetric Health Servs., Inc. v. Aetna Life & Casualty*, 903 F.2d

480 (7th Cir. 1990), support the continued applicability of *Michigan Academy* to Part A "method" claims. Br. in Opp. 15 n.5. They argue that the Seventh Circuit might not "adhere to that approach in a [Part A] case governed by the 1986 amendment." *Ibid.* But this assertion is inexplicable, because, as noted above, the 1986 amendment did not affect the treatment of Part A claims at all. In fact, there is every reason to expect that the Seventh Circuit will continue to recognize that Part A "method" claims (and, based on the same analysis, Part B "method" claims as well) are not covered by the administrative review process and may therefore be litigated in court under *Michigan Academy*.

The reason for this conflict among the circuits is not difficult to discern. As the D.C. Circuit here acknowledged, there is an apparent tension between *Michigan Academy* and the Court's prior line of cases culminating in *Ringer*. *See* Pet. App. 6a-7a. The Government here glosses over this problem by disregarding the Court's statutory analysis in *Michigan Academy* and arguing that the case was inadvertently overruled by Congress through the enactment of an amendment that is irrelevant to that statutory analysis. But the need for clarification of this Court's prior decisions remains glaringly apparent.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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